



National Historic Preservation Act

BACKGROUND:

The National Historic Preservation Act (NHPA) was enacted in 1966 to protect the Nation's historical resources from increasing development and expansion pressures by establishing a comprehensive national historic preservation policy. It defines historic properties to encompass a broad interpretation of American history and acknowledges significance at all levels, not just nationally. Furthermore, historic properties are now understood and appreciated as part of—not isolated from—the landscape in which they belong. Implementation of this act is mainly through 36 Code of Federal Regulations (CFR) part 63, *Determinations of Eligibility for Inclusion in the National Register of Historic Places*, and 36 CFR part 800, *Protection of Historic Properties*. The regulations that implement the NHPA and their accompanying guidance documents formulate a proactive national policy on historic preservation. It specifically directs federal government agencies to take historic preservation into account in planning their initiatives and actions. Thus, the federal government is now a full partner and a leader in historic preservation.

STATUTE:

National Historic Preservation Act of 1966, as amended.

REGULATIONS:

36 CFR part 63: *Determinations of Eligibility for Inclusion in the National Register of Historic Places*.

36 CFR part 800: *Protection of Historic Properties*.

REFERENCES:

U.S. Department of Energy

Office of Air, Water and Radiation Protection Policy and Guidance (EH-41) Information Brief. *State and Tribal Historic Preservation Officers*. DOE/EH-412-0007r. Revised February 2006.

Office of Air, Water and Radiation Protection Policy and Guidance (EH-41) Information Brief. *Management of Cultural Resources at Department of Energy Facilities*. DOE/EH-412/0005r. Revised February 2006.

Office of Congressional and Intergovernmental Affairs (CI). *American Indian and Alaska Native Tribal Government Policy*.¹ January 2006.

Office of Air, Water and Radiation Protection Policy and Guidance (EH-41) Information Brief. *Consultation with Native Americans*. DOE/EH-41-0019/1204. December 2004.

Office of Environment, Safety and Health (EH). *Environmental Guidelines for Development of Cultural Resource Management Plans—Update*. DOE G 450.1-3. September 22, 2004.

Office of Air, Water and Radiation Protection Policy and Guidance (EH-41) Memorandum and Summary. *Amendments to Section 106 Regulations of the National Historic Preservation Act*. July 24, 2004.

Office of Environment, Safety and Health (EH). *Department of Energy Management of Cultural Resources*. DOE P 141.1. May 2, 2001.

Office of Intergovernmental and Public Accountability (EM-11). *A Guide for DOE Employees Working with Indian Tribal Nations*.² December 2000.

Office of Environment, Safety and Health (EH) and Office of Management and Administration (MA)³ Memorandum of Understanding. *Coordination of Responsibilities and Activities for Historic Preservation and Cultural Resources Management*. March 1, 2000.

¹ This policy is implemented by DOE Order 1230.2. It replaces the 1992 Policy that was Attachment 1 to that Order.

² The DOE American Indian Policy included as Appendix 3 in this document is the 1992 Policy that has been replaced by the January 2006 Policy referenced above.

³ Currently known as the Office of Management (MA).

REFERENCES (cont.):

U.S. Department of Energy (cont.)

Office of Environmental Guidance (EH-232)⁴ Memorandum. *National Historic Preservation Act Amendments of 1992*. August 26, 1993.

Office of Congressional and Intergovernmental Affairs (CI). *American Indian Tribal Government Policy*.⁵ DOE Order 1230.2. April 4, 1992.

Office of Environmental Guidance (EH-231)⁴ Memorandum. *Management of Cultural Resources at Department of Energy Facilities*. February 23, 1990.

U.S. Department of the Interior, National Park Service

The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act. April 24, 1998 (63 *Federal Register* [FR] 20495).

Archeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines. September 29, 1983 (48 *FR* 44716).⁶

MAJOR PROVISIONS OF THE NATIONAL HISTORIC PRESERVATION ACT

The NHPA defines *historic preservation* as “the protection, rehabilitation, restoration and reconstruction of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, or culture.”

The NHPA established the following entities to carry out the provisions of the act:

- National Register of Historic Places (the National Register), a list of cultural resources of national, regional, state, or local significance that is kept by the Department of the Interior's (DOI's) National Park Service (NPS);
- Advisory Council on Historic Preservation (ACHP), an independent federal agency responsible for administering the protective provisions of the NHPA; and
- Historic Preservation Fund, a fund to provide federal money for a program of 50/50 matching grants to states and local entities to preserve significant historic properties.

Sections 106 and 110 of NHPA define the scope and intent of the law and contain the major provisions

for federal agencies. These sections form the basis for the implementing regulations that mandate federal historic preservation activities, including the Department of Energy's (DOE's) management of cultural resources.

Section 106

Section 106 of the NHPA makes historic preservation a part of all federal agencies' planning, decisionmaking, and project execution. It is action driven, requiring the head of each federal agency to ensure that the provisions of the NHPA are administered and mandating consultation related to potential federal actions. It compels federal agencies to “take into account” the effect of their projects on historical and archaeological resources, even if the projects would not be located on their land (i.e., DOE must consider projects on non-DOE-owned as well as DOE-owned property). Thus, before approving the expenditure of federal funds on an undertaking or before issuing a license, agencies must consider the effect of the undertaking or license on any district, site, building, structure, or object that is included in, or eligible for inclusion in, the National Register. (Note that the “take into account” standard sets up a process; it does not mandate a particular outcome.) Section 106 also requires agencies to provide the ACHP a reasonable opportunity to comment on potential effects so that impacts can be avoided or

⁴Currently known as the Office of Air, Water and Radiation Protection Policy and Guidance (EH-41).

⁵The policy contained in Attachment 1 to this DOE Order was replaced by the *American Indian and Alaska Native Tribal Government Policy* of January 2006. The Order itself is still in effect and implements that policy.

⁶The National Park Service has updated portions of the Standards and Guidelines but has not republished them in the *Federal Register* since 1983. An updated version of the 1983 document is available on the NPS web site.

mitigated. However, the ACHP opinions on effect findings are advisory and do not require federal agencies to reverse their initial findings.

Section 106 applies when two thresholds are met: there is a federal or federally licensed action, including grants, licenses, and permits, and that action has the potential to affect properties listed in or eligible for listing in the National Register. Procedures for complying with Section 106 of the NHPA are detailed in 36 CFR part 800. These regulations establish methods for federal agencies to identify and evaluate historic properties; assess the possible effects of their actions on historic properties; and, if there is a harmful or adverse effect on such properties, develop a plan to avoid or minimize the adverse effects to the extent possible. The process, if properly implemented, can encourage creativity and a common-sense approach to problem solving and conflict resolution.

The heart of Section 106 review is the consultation process. Section 106 consultation normally takes the form of discussions between the federal agency and the State and/or Tribal Historic Preservation Officer⁷ (SHPO or THPO). (See the EH-41 Information Briefs on *State and Tribal Historic Preservation Officers* and *Consultation with Native Americans*.) It may also include tribal governments; Native American groups; Native Hawaiian organizations; local governments; applicants for federal assistance, permits, licenses, and other approvals; and other interested parties. (If a tribe does not have a THPO, consultation for undertakings on tribal lands must be done with the SHPO. Nevertheless, tribes that do not have a certified THPO have the same consultation and concurrence rights as those with THPOs when an undertaking takes place, or affects historic properties, on their tribal lands. The practical difference is that during the consultation process for such undertakings, tribes with THPOs would be consulted *in lieu of* the SHPO, while tribes that do not have certified THPOs would be consulted *in addition to* the SHPO.) In controversial or precedent-setting situations, the ACHP may also be a participant.

The regulations implementing Section 106 emphasize open, good-faith consultation and the development of binding agreements as the best way to demonstrate that the “take into account” standard has been achieved. These binding agreements normally take the form of a Memorandum of Agree-

ment (MOA) among the consulting parties. If DOE enters into a MOA, which is an enforceable legal document, it agrees to implement its terms.

If DOE and the other consulting parties fail to agree on the terms of an MOA, the Section 106 process is terminated, and DOE must request comments from the ACHP. The ACHP members consider the matter and issue advisory comments to the Secretary of DOE. The Secretary must consider those comments in reaching a final decision on the undertaking and must report that decision to the ACHP. DOE is not, however, required to follow the ACHP’s opinions, only to ensure that they are considered during the decisionmaking process.

Section 110

The intent of NHPA Section 110 is to ensure that historic preservation is fully integrated into the ongoing programs and missions of federal agencies. Section 110 requires federal agencies to provide leadership in preserving, restoring, and maintaining the historic and cultural environment of the Nation. The NHPA Amendments of 1992 clarified Section 110 and directed federal agencies to establish preservation programs commensurate with their missions and the effects of their authorized programs on historic properties. Thus, Section 110 prescribes the general and specific responsibilities of federal agencies in the protection of historically significant properties.

Section 110(a) requires federal agencies to assume responsibility for the preservation of historic properties. In cooperation with the SHPO or THPO agencies are to locate, inventory, and nominate to the National Register all historic properties under their ownership or control. This systematic program must include taking an inventory of surface and sub-surface cultural resource sites. Federal agencies must use any historic properties available to them before acquiring, constructing, or leasing other buildings.

Section 110 also requires federal agencies to ensure that if, as a result of their action or assistance, a property listed on the National Register is to be substantially altered or demolished, timely steps are taken to make records of the property. A copy of such records is to be deposited for future use and reference in the Historic American Buildings Survey or

⁷The regulations (36 CFR 800.16[w]) define the term “THPO” as “the tribal official appointed by the tribe’s chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.”

Historic American Engineering Record maintained by the Library of Congress.

Standards and guidelines for implementing Section 110

The NPS, in consultation with the ACHP, has developed *The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act* (Section 110 Guidelines). The guidelines (initially published in 1988 [53 FR 4727, February 17]) were revised in 1998 (63 FR 20495, April 24) to take into account the 1992 amendments to the NHPA. The guidelines have no regulatory authority; they are simply formal suggestions from the Secretary of the Interior on how federal agencies can meet the requirements of Section 110 of the NHPA.

The guidelines describe the qualities of an effective and efficient agency historic preservation program that meets the requirements of Section 110. They assist agencies in carrying out their missions, programs, and projects in a manner consistent with the requirements and purposes of Section 110. Agencies are expected to review their operating policies and procedures, taking into account applicable portions of the Section 110 Guidelines, to ensure (1) that such policies and procedures are consistent with the requirements of the NHPA and (2) that the qualities of effective preservation described in the guidelines are fully integrated into existing operations and management. For agencies, like DOE, that manage large tracts of land or administer programs that often affect historic properties, the guidelines can serve as a model for the development of agency-specific historic preservation programs. DOE's policy on *Management of Cultural Resources* (DOE P 141.1) is consistent with the Section 110 guidelines.

Relationship between Section 106 and Section 110

The overall intent of Sections 106 and 110 of the NHPA is to ensure that historic properties are appropriately considered during planning for federal initiatives and actions. Section 106 is a specific, issue-related mandate to which federal agencies must adhere; it is a reactive mechanism that is driven by a proposed federal action. Section 110, in contrast, sets out broad federal agency responsibilities with respect to historic properties; it is a proactive mechanism that emphasizes ongoing management of historic sites and preservation activities at federal facilities. The principles and approaches set forth in the Section 110 Guidelines have been approved by the ACHP, so that by using them federal agencies will fulfill their responsibilities under Section 106.

Thus, an effective management program based on the Section 110 guidelines ensures that the requirements of Section 106 are met. As noted above, DOE's policy on *Management of Cultural Resources* is consistent with the Section 110 guidelines.

Compliance under emergency conditions

The regulations implementing the NHPA include provisions in 36 CFR 800.12 for complying with the law under disaster or emergency conditions. Agencies that may need to implement emergency provisions for multiple undertakings are urged by the ACHP to develop agency-wide procedures for taking historic properties into account during emergency operations. For example, DOE was instrumental in the development of a Programmatic Agreement (PA) for federal agencies to use to ensure that historic properties are taken into account in planning for and conducting an emergency response under the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300).

Eligibility for inclusion in the National Register of Historic Places

Eligibility requirements for inclusion in the National Register are found in 36 CFR part 63, *Determinations of Eligibility for Inclusion in the National Register of Historic Places*. This regulation describes the process federal agencies should follow to request determinations from NPS as to the eligibility of a property or site for inclusion in the National Register. It also outlines the procedures used by NPS in determining such eligibility. The specific criteria for evaluating a site to determine if it is eligible for inclusion are contained in 36 CFR 60.4, "Criteria for Evaluation."

The SHPO and THPO can help DOE staff to identify historic properties. They will have information concerning (1) properties already listed in the National Register, (2) properties in the process of being nominated to the National Register, and (3) properties determined by the Secretary of the Interior to be eligible for listing in the National Register, as well as other information that would assist in identifying properties in the area of a proposed action. In addition, the National Register Information System (NRIS), a database containing information on places listed in or determined eligible for the National Register, can be accessed at <http://www.cr.nps.gov/nr/research/nris.htm>. DOE program managers must exercise caution to ensure that any properties under their jurisdiction or control that "are listed in or may be eligible for the National Register are managed and maintained in a way that

considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with section 106 of [the NHPA]...” (NHPA, section 110 [a][2][B])

National Historic Landmarks

National Historic Landmark (NHL) designation is an official recognition by the federal government of a historic property’s significance to the Nation as a whole. NHLs include districts, sites, buildings, structures, or objects that have been judged by the Secretary of the Interior to possess national significance in American history, archeology, architecture, engineering, and culture and that have been designated as NHLs by the Secretary. Fewer than 2,500 historic places bear this distinction. The criteria for evaluating properties for possible NHL designation are found in 36 CFR 65.4. The NPS nominates new landmarks and provides assistance to existing landmarks through its NHLs Program. (See information on DOE’s NHLs below.)

Coordination and consultation

Federal agencies have specific responsibilities under Sections 106 and 110 to carry out their historic preservation activities in consultation with other governmental organizations and with non-governmental organizations and individuals who might be concerned about the agencies’ preservation activities. The NHPA and its implementing regulations and guidance require DOE to involve and/or consult a number of external organizations. Involvement may include direct consultation and discussion or simple notification of interested persons, giving them an opportunity to comment on DOE preservation activities or decisions.

The major parties with responsibilities for and/or interest in federal historic preservation activities are described below:

National Park Service (NPS)

The NPS has been delegated the authority to perform many of the responsibilities specifically given to the Secretary of the Interior by the NHPA. The NPS sets certain government-wide preservation standards and operates several programs to help coordinate federal agency activities. Cultural resource experts in the NPS’s Headquarters and Regional Offices, national parks, and various service centers can be consulted for information and technical assistance. The NPS also administers the National Center for Preservation Technology and Training and oversees the National Register and NHLs programs.

Advisory Council on Historic Preservation (ACHP or the Council)

The ACHP advocates full consideration of historic values in federal decisionmaking; reviews federal programs and policies to promote effectiveness, coordination, and consistency with national preservation policies and programs required by NHPA; and recommends administrative and legislative improvements for protecting our Nation’s heritage. The Council may participate in controversial or precedent-setting situations during Section 106 consultations. Also, the ACHP’s guidance on avoiding and mitigating adverse effects on historic properties may be useful to DOE in implementing a Section 110 program. Many activities required by Section 110 are subject to review by the ACHP under Section 106 of the NHPA and its implementing regulations.

State and Tribal Historic Preservation Officers (SHPOs and THPOs)

Section 101(b)(3) of the NHPA gives SHPOs and THPOs the responsibility, in cooperation with federal agencies, to direct and conduct comprehensive statewide or tribal-wide surveys of historic properties and to maintain inventories of such properties. State and tribal officials also preserve important information on historic properties in Comprehensive Historic Preservation Plans and are required to have qualified preservation professionals on staff. Federal agencies are directed in Section 110(a)(2) of NHPA to cooperate with SHPOs and THPOs in establishing programs to locate, inventory, and nominate historic properties to the National Register. Federal agencies are *advised* to solicit the opinions of the SHPOs or THPOs and to seek their assistance in meeting their Section 110 responsibilities; 36 CFR part 800 *requires* federal agencies to do so to comply with Section 106. DOE staff can obtain the names and addresses of the SHPOs and THPOs from DOE’s Federal Preservation Officer (FPO) (see below), EH-41, or other organizations as described in EH-41’s *State and Tribal Historic Preservation Officers Information Brief*.

Indian tribes and other Native American groups

Archeological sites and historic properties that may be eligible for listing in the National Register can have cultural significance to Indian tribes and other Native American groups. Under the regulations implementing the Archaeological Resources Protection Act (ARPA), Indian tribes must be notified prior to the issuance of permits that may result in harm to any site on public lands that may have religious or cultural significance to them. Also, DOE offices

should coordinate with Native Americans when implementing NHPA Section 110 to assure that the treatment and use of such properties occur in a manner consistent with the intent of the American Indian Religious Freedom Act (AIRFA) and DOE Order 1230.2, *American Indian Tribal Government Policy*. (See the EH-41 information brief, *Consultation with Native Americans*.)

Other government agencies

If possible, DOE's Section 110 activities should be coordinated with those of other federal agencies that have concurrent jurisdiction over land or programs, manage adjacent or nearby lands, or have relevant expertise. DOE personnel are also urged to seek the opinions of local governments in carrying out their historic preservation responsibilities.

Other organizations

Professional and non-profit organizations can recommend service providers to DOE and assist DOE in evaluating the capabilities of professionals in particular fields. Lists of appropriate non-profit organizations can be obtained from the SHPO or THPO. Statewide and local organizations can also assist in understanding state or local historic contexts. In addition, specific projects can be of interest to people in academic institutions, local preservation organizations, historical or archeological commissions, and other groups that promote historic preservation.

General public

Members of the general public with interests in historic preservation should be given reasonable opportunities to comment on DOE preservation programs. Thus, DOE offices should ensure that their preservation programs include public participation. Public notices of agency plans and program activities (e.g., a Notice of Intent to prepare an Environmental Impact Statement under the National Environmental Policy Act) normally provide adequate information on preservation issues to elicit public views.

Historic and cultural resource preservation

The NHPA definition of historic preservation, as stated above, includes preservation of cultural resources. Although the law does not concentrate on the cultural aspects of historically significant resources, Section 110 requires federal agencies to consider protection of cultural resources in planning their activities. An internal DOE guidance memo entitled *Management of Cultural Resources at Department of Energy Facilities* (February 23, 1990) informed DOE facilities and programs of the re-

quirements for complying with the provisions of NHPA dealing with the protection of cultural resources. As this memo points out, "DOE facility and program managers must consult with their respective ... SHPOs [and THPOs] concerning specific compliance requirements and cultural resource preservation planning. Consultation with the ... ACHP may also be required in some cases and should be extended to include appropriate local historical organizations, interested individuals and groups, and American Indian Tribes."

DOE'S CULTURAL RESOURCES MANAGEMENT POLICY AND PROGRAM

DOE is committed to protecting historical and cultural resources through its cultural resources management program (CRMP). DOE's policy on management of cultural resources at its properties is detailed in DOE P 141.1 (May 2, 2001). The policy ensures that DOE maintains a program that reflects the spirit and intent of the cultural resources legislative mandates. DOE's historic preservation program is site based (i.e., officials at each DOE site are responsible for historic properties located on their site). Thus, each DOE facility should develop a CRMP that is responsive to the cultural resources policy. EH-41 has an updated document (DOE G 450.1-3) containing guidelines for developing CRM plans. Following the guidelines in that document will ensure that DOE facilities and programs are complying with the spirit and intent of the cultural resources legislation.

DOE's Federal Preservation Officer

The NHPA requires the head of each federal agency to designate a qualified official to be the agency's FPO. DOE's chief departmental historian in the DOE Office of History and Heritage Resources (MA-75) (<http://www.mbe.doe.gov/me70/history/index.htm>) (part of the Office of Management [MA]) has been designated as the agency's FPO. The FPO coordinates DOE's activities under the NHPA including reviewing and signing all applications for properties being nominated to the National Register, acting as a liaison between DOE facilities and programs and other federal agencies regarding historic preservation issues, providing assistance to DOE facilities, and monitoring DOE preservation activities. The FPO takes the lead on DOE-wide historic preservation issues while assisting the sites in fulfilling their site-specific responsibilities.

The FPO's work is done in conjunction with staff in DOE's Office of Air, Water and Radiation Pro-

tection Policy and Guidance (EH-41). That office develops specific DOE guidance on compliance with the full range of cultural resource statutes and helps to implement DOE's Cultural Resources Management Policy. (See EH-41 information brief, *Management of Cultural Resources at Department of Energy Facilities*.)

A Memorandum of Understanding (MOU) between EH and the organization known at that time as the Office of Management and Administration (MA) was signed on March 1, 2000. The MOU describes the coordination of responsibilities and activities between these two DOE offices.

DOE's National Historic Landmarks

DOE has two properties that have been designated by NPS as NHLs: the Graphite Reactor (<http://www.ornl.gov/info/news/cco/graphite.htm>) at Oak Ridge National Laboratory in Oak Ridge, Tennessee, and the Experimental Breeder Reactor-1 (EBR-1) (<http://www.inl.gov/factsheets/eb-1.pdf>) at Idaho National Laboratory, 50 miles (80 km) west of Idaho Falls, Idaho. The Graphite Reactor is open seasonally for public tours through the American Museum of Science and Energy in Oak Ridge. EBR-1 is open to the public daily from Memorial Day weekend through Labor Day.

In addition, several other DOE facilities have been listed as historic landmarks by various national professional societies (e.g., National Historic Mechanical Engineering Landmarks by the American Society of Mechanical Engineers, Nuclear Historic Landmarks by the American Nuclear Society). DOE's FPO or EH-41 can provide further information on DOE historic properties.

Questions of policy or questions requiring policy decisions will not be dealt with in EH-41 Information Briefs unless that policy has already been established through appropriate documentation. Please refer any questions concerning the subject material covered in this Information Brief to Lois Thompson, Office of Air, Water and Radiation Protection Policy and Guidance, EH-41, (202) 586-9581; fax: (202) 586-3915; e-mail: Lois.Thompson@eh.doe.gov.